Supreme Court of the United States

OCTOBER TERM, 1948.

No. 271

In the Matter of the Criminal Contempt Charge

—against—

ROBERT CARUBA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CHANCERY OF NEW JERSEY.

THOMAS J. BROGAN,
JACOB L. NEWMAN,
JOSEPH WEINTRAUB,
PHILIP B. KURLAND,
For the Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully shows:

JURISDICTION.

The order of the Chancellor of New Jersey was entered on July 6, 1947. Jurisdiction of this Court is invoked under Title 28, Section 1257(3) of the United States Code.*

*In the event that this petition for certiorari is granted, the writ should be directed to the Superior Court of New Jersey. It is that court to which, under the New Jersey Constitution of 1947, pending cases are transferred from the Court of Chancery when the Judiciary Article of that Constitution takes effect on September 15, 1948. Art. XI, Sec. IV, para. 8(e); Art. XI, Sec. IV, para. 14. A cause is deemed "pending" if "the time limited for review has not expired." Art. XI, Sec. IV, para. 8.

An appeal has been taken from the order of the Chancellor, from which this petition is sought, to the New Jersey Court of Errors and Appeals. At this time, it is not clear whether the Court of Errors and Appeals has jurisdiction to entertain that appeal. If that appeal is dismissed, the order of the Chancellor will be the final decree for purpose of certiorari. If the Court of Errors and Appeals determines that the appeal lies, petitioner respectfully requests that this petition for certiorari be dismissed for want of a final decree.

The Court of Errors and Appeals is not expected to act upon the appeal from the Chancellor until after the time to petition for certiorari from the decree of the Chancellor has expired. It is for this reason that the petition has been filed at this time. Petitioner, however, respectfully requests that this Court withhold action upon this petition until the Court of Errors and Appeals discloses whether the decree of the Chancellor is final under the laws of New Jersey.

OPINIONS BELOW.

The opinion of the Vice Chancellor (R. 42-74) is reported in 139 N. J. Eq. 404. The opinion of the Court of Errors and Appeals (R. 2/82) is reported in 140 N. J. Eq. 563. The opinion of the Chancellor (R. 22//) is not yet reported.

STATUTES INVOLVED.

The pertinent New Jersey statutory provisions are set forth in the appendix *infra*.

QUESTIONS PRESENTED.

1. Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment for an appellate court to make a finding of obstruction to the administration of justice in a case of criminal con-

tempt where there has been no prior charge or determination of obstruction in the trial court.

2. Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment for the courts of New Jersey to deprive a person found guilty of criminal contempt of the judicial review to which he and others in his situation are entitled under the New Jersey statutes and under the recognized judicial construction of those statutes.

3. Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment to try and to adjudge as criminal contempt acts of perjury or false swearing which are, in fact, not obstructive to the administration of justice.

STATEMENT.

A somewhat lengthy statement of facts is required: first, because of the complicated proceedings in the New Jersey courts; second, because petitioner contends that he has been deprived of due process of law and equal protection of the laws in violation of the Fourteenth Amendment by the very course of these proceedings; and finally, because the issue whether the federal questions have been timely raised depends, in part, on the unusual and surprising judicial action which this case presents.

The petitioner, Robert Caruba, is one of several defendants in a civil action pending in the New Jersey Court of Chancery since September, 1945. The contempt charge which frames the issue in this case arose in one of the phases of that litigation in the following manner:

Early in the presentation of complainant's case, complainant obtained an order for discovery. A master was designated to supervise the inspection of the books and records at the expense of the complainant (R. 897-901). The master's

function was solely to "supervise" the inspection and examination and "to report to this Court any situation or difficulty arising with respect to the observance of the directions of this order or with respect to any situation arising not covered by the provisions hereof" (R. 229, 233). The master was not empowered to make any findings of fact. The evidence taken by him merely became part of the record in the civil litigation.

While the petitioner, an accountant, was testifying before the master with reference to the books and records, the two instances of "perjury" which led to the contempt charge occurred.

During his examination before the master, on April 2, 1946, Caruba was shown a check dated March 8, 1943 in the sum of $250.00 drawn on the checking account of the Imperial Fur Blending Corporation, a defendant, by Robert Caruba as its Treasurer to his individual order. This check had been mutilated: the endorsements had been cut off. Caruba testified that this check represented monies advanced to Philip A. Singer, another defendant, for certain expenses Singer had incurred on a trip to Montreal, and that he, Caruba, had cashed the check and given the proceeds to the defendant Villani who apparently was to turn them over to Singer. This testimony was concededly truthful. The alleged perjury was with respect to the following:

Caruba testified that he didn't know that the endorsements had been snipped off. On April 5, 1946, while Caruba was still being examined by the complainant, he denied that he knew who had sheared off the endorsements but that from an examination of the bank endorsements on the back of the check he believed that the check bore his own endorsement and that of a Mr. Ball, who cashed the check as an accommodation. He also testified that the portion of the check which was "snipped" off disclosed the Montreal trip of Mr. Singer. He then testified further that he himself had mutilated the check prior to the trial of the case. Subsequently, a photostatic copy of the check was obtained from the bank at which

it had been cashed and offered as an exhibit. The front of the check contained the notation "Traveling Expenses—Montreal" and the check bore, as Caruba had testified, endorsements by Caruba and Ball (R. 7-14).

The second "perjurious" incident, on which the contempt charge rests, concerned testimony about a check in the sum of $800.00, dated June 22, 1945, and payable to M. Reiner & Bro., Inc. This check was charged on the books of the Imperial Fur Blending Corporation as a loan to Caruba. On May 2, 1946, Caruba testified that this check was for the purchase of a fur coat which had been bought for the firm. He then proceeded to testify that the coat had been purchased for "experimental purposes, copying" but, after further examination, testified as follows:

> "Q. If the transaction involving the $800 expense was as you narrate it here, why did you hesitate when first asked about it, to state the reason, and stated you preferred not to? A. Because I just didn't want to say it, that is all.
>
> Q. No reason? A. No particular reason for it.
>
> Q. Just caprice? A. Call it what you wish.
>
> Q. I am asking you for the reason. Was it caprice? A. No, I just didn't want to give out the information where we used that $800.
>
> Q. What injury to your company did you fear from narrating this transaction which I have finally gotten from you? A. None.
>
> Q. What injury did you fear to yourself? A. I gave a gift there, I didn't want you to misunderstand it.
>
> Q. To whom? A. It is a matter of giving a gift to Singer, Philip Singer, in 1945.
>
> Q. Then you do know for whom the coat was made, for Philip Singer? A. As a gift, yes.
>
> Q. Why didn't you tell that at first? A. I just didn't say it, that is all.
>
> Q. Why did you tell us the story that this coat was

bought for experimental or copying purposes when in fact, and to your knowledge, it was your gift to Philip Singer? A. That is the way I thought it out. I just didn't want to give the information, that is all.

Q. It was a gift to Philip Singer, it wasn't for his personal wear, was it? He doesn't wear a mink coat? A. No.

Q. For whom was the coat intended. A. For Mrs. Singer.

Q. You knew it, didn't you? A. Yes.

Q. Did Singer ever give you back the $800? A. No, sir.

Q. Purely a gift? A. Purely a gift.

Q. That is how we get $800 out of your $2,500 bonus? A. That is true.

Mr. Ruback: I offer in evidence the $800 check dated June 22, 1945, respecting which the witness has just been interrogated, check made by the Imperial, signed by Caruba to the order of M. Reiner & Bro.

(Check, above referred to, received in evidence, and marked Exhibit CM-63.)

Q. Mr. Caruba, what is the reason you made a $800 gift to Mr. Singer's wife? A. He was very helpful to us during 1945.

Q. He was then employed as the business manager of the Imperial? A. Sales manager in New York.

Q. In charge of the New York office? A. That is right.

Q. For which he got $200 a week? A. Correct.

Q. Which $200 was cleared through your name? A. That is true.

Q. Notwithstanding the fact he was getting $200 a week for his services, you felt that you personally should make him a gift of $800? A. That is true." (R. 15-31)

The last of the testimony described above was given on May 2, 1946. The discovery proceedings and the proceedings in the main case were in no way delayed by the "perjurious" testimony.

On September 14, 1946 the complainant presented a petition, formally made out to the Chancellor but, in fact, presented to the Vice Chancellor[1] who had appointed the master, asking that Robert Caruba be adjudged guilty of criminal contempt. Although the master had never indicated that Caruba's testimony had been contemptuous or obstructive, the Vice Chancellor immediately issued an Order to Show Cause why the petitioner should not be punished for contempt, returnable September 19, 1946. On September 19, 1946 the hearing on the Order to Show Cause was continued until October 9, 1946 and also on the same day Meyer E. Ruback, solicitor for the complainant in the litigation, was appointed solicitor to prosecute the contempt proceeding for the court.

At the hearing the petitioner pleaded "not guilty".[2] The prosecutor for the court introduced in evidence the petition asking that criminal contempt proceedings be instituted (the parties had stipulated that the petition correctly set forth Caruba's testimony); the checks with reference to which Caruba testified; and, on the issue of materiality only, all of the testimony in the main case, then transcribed, which included the complainant's direct case and a part of the direct testimony of the first witness for the defense (R. 92-95). He then rested (R. 96). No evidence was introduced on behalf of the petitioner, but various arguments were made in support of a motion to dismiss

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[1] In New Jersey acts of a Vice-Chancellor are in form merely recommendations to the Chancellor in whose name all orders are issued. See, *e.g.*, In re New Jersey State Bar Association, 112 N. J. Eq. 606, 617 (1933). Nevertheless, an appeal may lie from the Vice Chancellor to the Chancellor. Such an appeal, as the statement of facts discloses p. 11 *infra*, was taken at a later stage of this case under the provisions of N. J. R. S. 2:15-12.

[2] At the time of the trial of the contempt charge, the final hearing in the civil proceeding was still in progress. As of the present writing, the Vice Chancellor has not yet decided the issues in the civil proceeding.

the petition (R. 96-106). On January 29, 1947 the Vice Chancellor filed an opinion finding Caruba guilty of criminal contempt.[3] This opinion stated that the perjury was contumacious if it "tended" or "attempted" to obstruct justice.[4] No finding of actual obstruction was made. Indeed, the Vice Chancellor in his opinion affirmatively indicated that actual obstruction was not necessary.[5] The Vice Chancellor also determined that although the testimony had been taken before a master, the contempt was nevertheless *in facie curiae*. Other contentions of the petitioner were overruled. On February 20, 1947 proceedings were held looking toward imposition of sentence. The prosecutor for the court recommended a minimum confinement of six months (R. 131-132). The Court sentenced Caruba to sixty days in jail (R. 134).

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[3] This finding rested solely upon the two instances of false testimony. The mutilation of the check was neither charged nor found to be contumacious.

[4] The petition charged as to one instance of alleged perjury that "Said testimony was given corruptly and *for the purpose of* obstructing and subverting the justice of the cause." (R. 32) (Emphasis added.) As to the other incident, the petition charged that "the testimony was given by said witness *for the purpose* and *with the design of* misleading your Honor in the determination of the disputed facts in the case." (R. 15) (Emphasis added.) Immediately following this sentence, it was alleged that the conduct of Caruba was "obstructive." In context, the word "obstructive" clearly meant only an attempt to obstruct. Moreover, no facts were at any time presented to the Vice Chancellor to prove that the testimony, or any part of it, did have an obstructive effect.

[5] "The federal cases cited in support of the argument that where there is no obstruction of justice there is no contempt are not controlling. They all arose out of contempt proceedings in inferior Federal courts, the creatures of statute, having no common law jurisdiction in matters of contempt, and the decisions were controlled by statute. They need not be further considered here. None of the New Jersey cases cited is authority for the proposition advanced, They hold uniformly that any act or conduct which obstructs or *tends to obstruct* the course of justice constitutes a contempt of court."

* * * * *

"New Jersey cases holding that acts or conduct which *tend* to obstruct the course of justice, or which are merely *attempts* to obstruct, not actual obstruction of justice, constitute contempt of court are: In re Bowers, 89 N. J. Eq. 307; Ivens v. Empire Floor & Wall Tile Co., supra; In re Hand, 89 N. J. Eq. 469; In re Merrill, 88 N. J. Eq. 261; Sachs v. High Clothing Co., supra; In re Jenkinson, 93 N. J. Eq. 545; In re Megill, 114 N. J. Eq. 604; In re Hendricks, 113 N. J. Eq. 93; Backer v. A. B. & B. Realty Co., supra; In re Singer, supra; Edwards v. Edwards, 87 N. J. Eq. 546; Seastream v. N. J. Exhibition Co., supra. See also In re Charlton, 2 My & Cr. 317, 40 Eng. Rep. 661; People v. Freeman, supra. In the Charlton case Chancellor Cottenham, at page 671, said: 'All these authorities tend to the same point;

From the order holding petitioner in contempt of court, an appeal was taken to the New Jersey Court of Errors and Appeals under the following provisions of New Jersey law:

> "Whenever any person or corporation is adjudged in contempt by the court of chancery, *for acts done or omitted elsewhere than in the presence of the court,* and that court shall, in consequence, impose upon such person or corporation a fine, imprisonment or other punishment, such person or corporation may appeal from such adjudication to the court of errors and appeals, which appeal shall be taken and prosecuted in all respects as other appeals are taken and prosecuted from the court of chancery." N. J. R. S. 2:15-13. (Emphasis added.)

Inasmuch as the Vice Chancellor had jurisdiction only if the contempt was committed in the "actual presence of the court",[6] it was clear under the foregoing New Jersey statutes and under the applicable New Jersey decisions that the appellate body to determine this matter of jurisdiction was the Court of Errors and Appeals. If that Court decided that the contempt had been committed in the "actual presence of the Court," it should dismiss the appeal and the petitioner, under the provisions of N. J. R. S. 2:15-12, would

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they show that it is immaterial what measures are adopted, *if the object is to taint the source of justice,* and to obtain a result of legal proceedings different from that which would follow in the ordinary course, it is a contempt of the highest order.' In finding the defendant guilty of contempt in that case the Chancellor said his main offense was 'his having *attempted,* by writing the letter, *to influence* the conduct of the Master.' The first defense can not prevail."

[6] The power of the New Jersey courts to punish for contempt is limited by statute [similar to that controlling in the federal courts (18 U. S. C. §401)] to three cases: (1) "misbehavior of any person in the actual presence of the court"; (2) "misbehavior of an officer of the court in his official transactions"; and (3) disobedience to any lawful writ, process, order, rule, decree or command. N. J. R. S. 2:15-1. Concededly, if Caruba did not come within the first category, he was not guilty of contempt unless, of course, as the Vice Chancellor suggested in his opinion (R. 71-72) the statute was unconstitutional. If, therefore, the Court of Errors and Appeals had determined that the statute was constitutional and the contempt was not *in facie curiae,* it would have reversed the conviction.

then appeal from the decision of the Vice Chancellor to the Chancellor for a determination upon the merits. This section provides,

> "A vice chancellor, when sitting as a judge of the court of chancery for the transaction of the business of that court, may adjudicate upon and punish any and all contempts committed by any person in the presence of the court so held by the vice chancellor, in the same manner as the chancellor may do. Any person adjudicated guilty of contempt under this section shall have the right of immediate appeal to the chancellor which appeal shall operate as a stay of proceedings. The chancellor shall provide by rule for the manner and method of appeal, which he shall hear on its merits.
>
> "The several sheriffs and keepers of the common jails of the several counties of this state shall respect and execute all orders and commitments made and signed by a vice chancellor in any matter of contempt in all respects as if made and signed by the chancellor."

Following the indicated procedure, Caruba appealed to the New Jersey Court of Errors and Appeals. Since under the foregoing statutes that Court was limited in its jurisdiction to a determination whether the contempt had been committed within the "actual presence" of the court, Caruba was under no obligation to present any questions other than that of the jurisdiction of the Vice Chancellor for its consideration.[7]

The Court of Errors and Appeals by all rules and standards of New Jersey law should have dismissed the appeal,

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[7] Caruba did present questions on the merits to the Court of Errors and Appeals, however, because of the Vice-Chancellor's suggestion that the statutes of New Jersey limiting the powers of courts over contempts were unconstitutional. See note 6 *supra*.

it having found that the contempt was committed "in the actual presence" of the Court of Chancery. Its *per curiam* opinion, from which six of the thirteen members dissented, nevertheless dealt with the merits, although its order paradoxically provided for dismissal of the appeal as well as for affirmance.[8]

Surprised by the fact that the Court of Errors and Appeals had departed from the indicated limitations on its authority, Caruba filed a petition for rehearing prior to the issuance of the remittitur, presenting to that Court the constitutional issues upon which this petition is based. The petition was denied, as was a second such peition (R. 220 4).

Following the denial of the petitions for rehearing, Caruba appealed to the Chancellor under N. J. R. S. 2:15-12, it having been decided by the Court of Errors and Appeals that the contempt was committed in the "actual presence" of the Vice Chancellor. Appellant, following the plain mandate of this statute, believed that a full hearing on the merits could be secured only before the Chancellor. Moreover, had he not sought relief from the Chancellor, he would not have exhausted his state remedies and obtained a "complete" as well as a "final" judgment required for purposes of certiorari to the United States Supreme Court.[9]

Before the Chancellor, Caruba contended that it was for the Chancellor to determine all questions on the merits, and that the statements in the *per curiam* opinion of the Court of Errors and Appeals, in view of the statutory restrictions

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[8] "The order of the Court of Chancery made on the 20th day of February, 1947 from which the appellant appealed be and the same is hereby in all things affirmed with costs in this court to be paid by said appellant and that the petition of appeal in the same is hereby dismissed." (R. 218)

Prior to the enactment of N. J. R. S. 2:15-13, the Court of Errors and Appeals did not have jurisdiction to review contempt orders of the Court of Chancery, Seastream v. New Jersey Exhibition Co., 72 N. J. Eq. 377 (1907); Grand Lodge Knights of Pythias v. Jansen, 62 N. J. Eq. 737 (1901).

[9] See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936) §30; Prudential Insurance Co. v. Cheek, 252 U. S. 567 (1920), discussed in Prudential Insurance Co. v. Cheek, 259 U. S. 530, 533-534 (1922); dissenting opinion of Mr. Justice Rutledge in Parker v. Illinois, 333 U. S. 571, 583-584 (1948); Republic Natural Gas Co. v. Oklahoma, No. 134, O. T. 1947.

on that court's jurisdiction and its order dismissing the appeal were *obiter dicta*. He pointed out, in effect, that if the Chancellor refused to consider the merits of his case merely because of the statements in the opinion of the Court of Errors and Appeals, the following trap would have been sprung: Had Caruba initially appealed to the Chancellor under N. J. R. S. 2:15-12 rather than to the Court of Errors and Appeals, he would have conceded one of his principal arguments, that the contempt had not been committed in the actual presence of the Court. Yet the preliminary appeal to the Court of Errors and Appeals, which avoided this concession, deprived him of the hearing on the merits before the Chancellor to which, under N. J. R. S. 2:15-12, he was entitled if, as the Court of Errors and Appeals had determined, the misbehavior had been *in facie curiae*.

The Chancellor, although admitting that "a persuasive argument based on the statutory provisions could be made as to the authority of the Chancellor to presently entertain the defendant's statutory petition of appeal", nevertheless considered that it would be "presumptuous" of the Chancellor to deal with the merits when the Court of Errors and Appeals had already done so. He, therefore, limited the argument to the question whether the Chancellor could modify the sentence and held that he lacked the power to do so inasmuch as the sentence "had been approved by a court of last resort".

On July 6, 1948 the Chancellor entered an order dismissing the petition of appeal from the Vice Chancellor (R.22a5). The petition for certiorari is taken from that order.

One more possibility of appeal within the complicated New Jersey judicial system may exist. The Court of Errors and Appeals [10] may determine that it has jurisdiction to hear an

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[10] On September 15, 1948 the judiciary article, Art. VI, of the New Jersey Constitution becomes effective. Art. XI, Sec. IV, Par. 14. The New Jersey Supreme Court, which under the constitution becomes the court of last resort in New Jersey, may be the authority to pass upon the appeal. Art. VI, Sec. I; Art. XI, Sec. IV, Para. 8(a).

appeal from the Chancellor.[11] The petitioner, therefore, at the same time that he is presenting this petition for certiorari to the Supreme Court of the United States is appealing from the order of the Chancellor to the Court of Errors and Appeals. If this appeal is dismissed, the order of the Chancellor will be the final and complete decree for purpose of certiorari.[12] If, on the other hand, the Court of Errors and Appeals accepts jurisdiction of the appeal from the decision of the Chancellor, the petitioner requests that this petition for certiorari be dismissed, since the judgment of the Chancellor will not be a final decree.

Petitioner, therefore, respectfully repeats his request that this Court withhold action upon the petition for certiorari until action by the Court of Errors and Appeals discloses whether or not the decree of the Chancellor is final. Compare, as to the propriety of such a procedure, *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 163, n. 3 (1932).

THE FEDERAL QUESTIONS.

Petitioner presents three federal questions for the consideration of this Court. Each arises out of a different aspect of the contempt litigation, and the timeliness of the raising of each depends upon somewhat different considerations.

Question 1: Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment for an appellate court to make a finding of obstruction to the administration of justice in a case of criminal contempt where there has been no prior charge or determination of obstruction in the trial court.

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[11] Compare N. J. R. S. 2:29-117 with N. J. R. S. 2:15-12 and N. J. R. S. 2:15-13. To the knowledge of the petitioner, no appeal to the Court of Errors and Appeals has ever been attempted where, under N. J. R. S. 2:15-12, the Chancellor has refused to review a contempt order of the Vice Chancellor.

[12] If petitioner waited to file his petition for certiorari until after dismissal of the appeal, if such dismissal there be, by the Court of Errors and Appeals, the statutory period for filing a petition for certiorari might have elapsed. See Randall v. Board of Commissioners, 261 U. S. 252 (1923) and authorities cited.

The decision of the New Jersey Court of Errors and Appeals brought this question into existence for the first time, since it is that decision of which constitutional complaint is made. It was, therefore, timely for the petitioner to present this federal question in an explicit form at his earliest possible opportunity, that is, upon petition for rehearing. The perfunctory denial of this petition does not, under these circumstances, deprive petitioner of the right to invoke the question here. *Cole* v. *Arkansas,* 333 U. S. 196, 200 (1948); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 678 (1930); *Saunders* v. *Shaw,* 244 U. S. 317, 320 (1917); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U. S. 74, 79 (1930); *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313, 320 (1930); *Great Northern Ry* v. *Sunburst Oil & Refining Co.,* 287 U. S. 359, 367 (1932); Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936) 120-125. Nor is petitioner deprived of his right to invoke this question by his failure to present it to the Chancellor. The appeal to the Chancellor was not from the decision of the Court of Errors and Appeals but from the decision of the Vice Chancellor. N. J. R. S. 2:15-12. The Chancellor was without authority to determine that the Court of Errors had acted unconstitutionally, since under New Jersey Law he is an inferior tribunal. N. J. Const. Art. VI, Sec. 1; N. J. R. S. 2:29-117. But the petitioner had to seek a decision by the Chancellor prior to petitioning this Court for certiorari in order to exhaust his state remedies. See the discussion in *Republic Natural Gas Co.* v. *Oklahoma,* No. 134, O. T. 1947 and other authorities cited at note 9 of this petition.

Question 2: Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment for the courts of New Jersey to deprive a person found guilty of criminal contempt of the judicial review to which he and others in his situation are entitled under the New Jersey statutes and under the recognized judicial construction of those statutes.

This question, like the first, arises out of judicial action taken after the decision of the Vice Chancellor. For this reason, it was timely for petitioner, as in the case of the first question, to raise it at his earliest opportunity. Insofar as the existence of the question depends upon the action of the Court of Errors and Appeals, it was timely raised in the first petition for rehearing. Insofar as its existence depends upon the action of the Chancellor, the first opportunity petitioner has had is upon this petition for certiorari.[13]

Question 3: Whether it is a denial of due process of law or equal protection of the laws in violation of the Fourteenth Amendment to try and to adjudge as criminal contempt acts of perjury or false swearing which are, in fact, not obstructive to the administration of justice.

Petitioner admits that according to the usual rule this question should have been presented to the trial court and thereafter saved. If, however, state practice permits the federal question to be raised in the appellate court for the first time, this Court will take cognizance of the state procedure. *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651 (1942); *Reeves v. Williamson,* 317 U. S. 593 (1942). Petitioner does not contend that the state practice necessarily permits a federal question to be raised for the first time on appeal.[14] But, at the least, New Jersey follows the practice of most states in permitting appellate courts in their own discretion to consider contentions first raised on appeal. *McMichael* v. *Horay,* 90 N. J. L. 142, 145 (1917); *Punk* v. *Botany Worsted Mills,* 105 N. J. L. 647, 649 (1929). If this discretion is exercised, then, of course, the federal question

[13] It was useless to ask the Chancellor for rehearing, since he made his decision not to determine the merits known prior to the filing of his opinion.

[14] It may be noted, however, that under N. J. R. S. 2:15-12 the Chancellor is reviewing his own decision (R. 75-77). It might be argued, therefore, that since he must determine the matter "on its merits" under the foregoing statute, he must determine all questions, whether raised or not before the Vice Chancellor. Petitioner, although he does not concede this point, does not know of any New Jersey decisions which have passed upon the question.

is timely raised. Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1936) 130 and authorities cited at n. 1 thereof.

In the instant case petitioner was deprived of the opportunity of invoking the discretion of the Chancellor to determine federal questions not raised at the trial, since the Chancellor—unconstitutionally, he believes—refused to hear the merits. For this reason it was impossible for petitioner, once he had not presented his federal question to the trial court, to have the opportunity afforded by New Jersey law to all litigants to invoke the appellate discretion. This foreclosure, if it does not itself present a federal question here cognizable, should not deprive him of the right to be heard in this Court.

Petitioner, in the unique circumstances which this litigation presents, accordingly submits that all the federal questions were properly and timely raised.

REASONS FOR GRANTING THE WRIT.

Each of the questions here presented raises important issues as to the construction and application of the due process and equal protection clauses of the Fourteenth Amendment in the administration of justice in the state courts.

1. The petitioner was found guilty of perjury or false swearing which "tended" or "attempted" to obstruct the administration of justice. He appealed to the Court of Errors and Appeals on the ground that without the existence of actual obstruction the Vice Chancellor lacked jurisdiction to hold him in contempt. The Court of Errors and Appeals, apparently in agreement with petitioner's jurisdictional argument, made a finding that there was actual obstruction. In so finding, it deprived petitioner of the elementary right to have notice of and opportunity to defend a criminal charge. In the trial court petitioner was obliged to meet

only the question of intent. As the prosecutor said, "It is not the effect of this false swearing that tests the conduct of the accused, it is the purpose of the false swearing." (R. 107). Yet the appellate court, by its decision, made an issue of the "effect". "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948); *In re Oliver,* 333 U. S. 257, 273 (1948). Petitioner was not charged with actual obstruction,[15] nor was he found guilty by the Vice Chancellor of actual obstruction. The appellate court in violation of the rule established in *Cole* v. *Arkansas,* 333 U. S. 196 (1948) substituted its own findings of fact in a criminal trial [16] for those made in the trial court. Petitioner, as in the *Cole* case, was entitled to have the validity of his conviction "appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Id.* at 201.

2. The action of the New Jersey Court of Errors and Appeals, when taken in conjunction with the subsequent action of the Chancellor, deprived petitioner of the hearing on the merits to which he was entitled under the plain and unequivocal meaning of the New Jersey statutes. N. J. R. S. 2:15-12. Petitioner appealed from the holding of criminal contempt to the Court of Errors and Appeals in the belief, clearly justified by the New Jersey statutes (N. J. R. S. 2:15-1, 2:15-12, 2:15-13), that that Court was authorized to determine only whether the contempt had been committed in the "actual presence" of the court. Nevertheless, the Court in its opinion dealt with some of the merits of petitioner's case; and the Chancellor, who ordinarily would have determined the merits, thereafter refused to do so.

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[15] See note 4 *supra.*

[16] In New Jersey a charge of criminal contempt is considered a criminal charge. See *Patco Products* v. *Wilson,* 140 N. J. Eq. 91, 93 (1947).

Petitioner acknowledges that ordinarily there is no constitutional right to an appeal. But due process of law and equal protection of the laws demand that where the legislature has provided for an appeal, elementary notions of fairness and civilized justice must prevail, and all litigants are entitled to the same appellate opportunities. *Cole* v. *Arkansas*, 333 U. S. 196, 201 (1948); *Frank* v. *Mangum*, 237 U. S. 309, 327 (1915); *Cochran* v. *Kansas*, 316 U. S. 255 (1942); *Boykin* v. *Huff*, 121 F. 2d 865, 872 (App. D. C. 1941) (per Rutledge, J.). Due process of law and equal protection of the laws under the Fourteenth Amendment may be violated and were in this case violated by the courts of a state. See *Shelley* v. *Kraemer*, Nos. 72, 87, O. T. 1947; *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673 (1930).

3. It is the position of the petitioner that perjury or false swearing,[17] unless obstructive to the administration of justice, may not be tried by contempt but must be tried in accordance with the criminal procedure which the state provides. Although petitioner knows of no direct holding to that effect by the United States Supreme Court in a case arising in a state court, the language of *Ex parte Hudgings*, 249 U. S. 378, 383 (1919) seems clearly restrictive of all courts, state and federal.[18] Moreover, recent decisions such as *In re Oliver*, 333 U. S. 257 (1948); *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Bridges* v. *California*, 314 U. S. 252 (1940) indi-

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[17] New Jersey has both a perjury and a false swearing statute. N. J. R. S. 2:157-1; N. J. R. S. 2:157-4. Under the former, the falsity of the testimony must be proved by two witnesses or by one witness and corroborating evidence. State v. Lupton, 102 N. J. L. 530 (1926); State v. Ellison, 114 N. J. L. 237 (1935); State v. Ewen, 6 N. J. M. 151 (1928). Under the latter contradictory statements under oath constitute prima facie evidence that one or the other is false. N. J. R. S. 2:157-5.

[18] That Ex parte Hudgings, 249 U. S. 378 (1919) states a rule of due process rather than merely a judicial limitation upon the powers of the federal courts is indicated by the fact that Congress also may not punish for contempt non-obstructive acts. Brandeis, J. in Jurney v. MacCracken, 294 U. S. 125, 147-148 (1935); Marshall v. Gordon, 243 U. S. 521 (1917).

cate that the rule that the contempt power is "the least possible power adequate to the end proposed," *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1820), quoted by the Court in *In re Oliver*, *supra*, applies to the state as well as to the federal courts.[19] For contempt proceedings to be substituted for the usual criminal procedure, as Mr. Justice Frankfurter stated in his concurring opinion in the *Oliver* case, 333 U. S. at 284, "There must * * * be such recalcitrance, where the basis of punishment is testimony given or withheld, that the administration of justice is actively blocked. See *Ex parte Hudgings*, 247 U. S. 378."

If petitioner is correct in his argument that actual obstruction of the administration of justice is a constitutionally necessary prerequisite to criminal contempt for perjury or false swearing, it is for this Court to determine for itself whether the record discloses such obstruction, assuming the charge was properly made. *Oyama* v. *California*, 332 U. S. 633, 636 (1948) and cases cited therein at n. 4; *Pennekamp* v. *Florida*, 328 U. S. at 345-346. A reading of the record will disclose to the Court that the perjury or false swearing which gave rise to this proceeding was no more obstructive than the perjury in *In re Michael*, 326 U. S. 224 (1945). Here, as in the *Michael* case, "there was, at best, no element except perjury 'clearly shown.'"

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this case is one calling for the exercise by this Court of its jurisdiction by writ of certiorari.

Respectfully submitted,

THOMAS J. BROGAN,
JACOB L. NEWMAN,
JOSEPH WEINTRAUB,
PHILIP B. KURLAND.

September, 1948.

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[19] This Court recently granted certiorari in a case involving the power of a state court to adjudge acts in criminal contempt. *Fisher* v. *Pace*, No. 756, O. T. 1947.

APPENDIX.

New Jersey Constitution of 1844.

Article VI, Section 1, Paragraph 1.

The judicial power shall be vested in a court of errors and appeals in the last resort in all causes, as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require.

New Jersey Constitution of 1947.

Article VI, Section 1.

1. The judicial power shall be vested in a Supreme Court, a Superior Court, County Courts and inferior courts of limited jurisdiction. The inferior courts and their jurisdiction may from time to time be established, altered or abolished by law.

Article XI, Section 4.

8. When the Judicial Article of this Constitution takes effect:

(a) All causes and proceedings of whatever character pending in the Court of Errors and Appeals shall be transferred to the new Supreme Court * * *.

(e) All causes and proceedings of whatever character pending in all other courts which are abolished shall be transferred to the Superior Court.

For the purposes of this paragraph * * *, a cause shall be deemed pending notwithstanding that an adjudication has been entered therein, provided the time limited for review has not expired * * *.

14. The Judicial Article of this Constitution shall take effect on the fifteenth day of September, one thousand nine hundred and forty-eight.

New Jersey Revised Statutes.

2:15-1

The power of any court of this state to punish for contempt shall not be construed to extend to any case except that:

a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

c. Disobedience or resistance by any court officer or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the court.

2:15-12

A vice chancellor, when sitting as a judge of the court of chancery for the transaction of the business of that court, may adjudicate upon and punish any and all contempts committed by any person in the presence of the court so held by the vice chancellor, in the same manner as the court may do. Any person adjudicated guilty of contempt under this section shall have the right of immediate appeal to the chancellor, which appeal shall operate as a stay of proceedings. The chancellor shall provided by rule for the manner and method of appeal, which he shall hear on its merits.

The several sheriffs and keepers of the common jails of the several counties of this state shall respect and execute all orders and commitments made and signed by a vice chancellor in any matters of contempt in all respects as if made and signed by the chancellor.

2:15-13

Whenever any person or corporation is adjudged in contempt by the court of chancery, for acts done or omitted elsewhere than in the presence of the court, and that court shall, in consequence, impose upon such person or corporation a fine, imprisonment or other punishment, such person or corporation may appeal from such adjudication to the court of errors and appeals, which appeal shall be taken and prosecuted in all respects as other appeals are taken and prosecuted from the court of chancery.

2:29-117

All persons aggrieved by any order or decree of the court of chancery may appeal therefrom, or any part thereof, to the court of errors and appeals.

2:157-1

Any person who shall willfully and corruptly commit perjury or shall by any means procure or suborn any person to commit, corrupt and willful perjury, on his oath or affirmation, in any action, plea, suit, bill, answer, complaint, indictment, controversy, matter or cause depending or which may depend in any of the courts of this state, or before any referee or arbitrator, or in any deposition or examination taken or to be taken pursuant to the laws of this state before any public officer legally authorized to take the same, shall be guilty of a high misdemeanor.

2:157-4

Any person, his procurors, aiders and abettors, who shall willfully swear falsely in any judicial proceeding, or who shall willfully swear falsely before any person authorized by virtue of any provision of law of this state to administer an oath and acting within his authority, shall be guilty of false swearing.

2:157-5

Where a person has made contrary statements on his oath or oaths administered within the provisions of this article, it shall not be necessary to allege in an indictment or allegation which statement is false but it shall be sufficient to set forth the contradictory statements and allege in the alternative that one or the other is false.

Proof that both such statements were made under oath duly administered shall be prima facie evidence that one or the other is false; and if the jury are satisfied from all the evidence beyond a reasonable doubt that one or the other is false and that such false statement was willful, whether the same was made in any judicial proceeding or before a person authorized to administer an oath and acting within his authority, it shall be sufficient for a conviction.

2:157-6

The rule that there must be corroboration or proof by more than one witness to establish the falsity of testimony of statements under oath shall not be applicable to prosecution under this article. It shall not be necessary to prove, to sustain a charge under this article, that the oath or matter sworn to was material, or if before a judicial tribunal, that such tribunal had jurisdiction.

2:157-7

False swearing is hereby constituted a misdemeanor.